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U. S. SUPREME COURT DECISIONS.—We are glad to learn that the first volume of Mr. Justice MILLER's continuation of Curtis' Decisions is now in the hands of the printer and will soon be forthcoming. The profession will expect this desirable work to be brought down to date, and not to end with Wallace.

THE BANKRUPT ACT—JUDGE HOPKINS' DECISION IN HAMLIN V. PETTIBONE.—The criticism which we elsewhere print upon a point in Mr. District Juge HOPKINS' recent decision in Hamlin v. Pettibone (*ante*, p. 404), is from the pen of Asa Iglehart, Esq., of Evansville, Indiana. We express no opinion on the point (perhaps only a *dictum*) as to which he differs from the learned judge, but recommend the perusal, both of the opinion and of his criticism, to our readers. We suppose that discussion of this kind, conceived in the proper spirit, and conducted with judgment and discrimination, is always in order, and that there is no judge so able, nor yet any court so high, that may not, at times, be benefited by it. We shall be glad to hear from this writer again on other questions.

THE OSAGE CEDED LAND IN KANSAS.—We publish in this number the opinion of the United States Circuit Court for Kansas, delivered by Mr. Justice MILLER, and in which the circuit judge concurs, respecting the title to the Osage lands. The tract in controversy is 50 by 30 miles in extent, and the lands claimed by the railroads under their grants aggregated 960,000 acres, upon which between 30,000 and 40,000 settlers have their homes, and whose rights were involved in the litigation. The decision is adverse to the railroad companies and will inure to the benefit of the settlers.

This controversy, in amount one of the largest that ever came before the judicial tribunals for settlement, derives additional interest from the fact that the secretaries of the interior department, at different times, have decided different ways—the last decisions being favorable to the railroad companies. And from these considerations the questions of law involved are highly important, and the lucid exposition and treatment of them by the learned justice will be read with interest by all classes of the profession. The cause was argued at the last June term and taken under advisement, and the decision has just been rendered. It gives us pleasure to lay the opinion before our readers at this early date.

RAILWAY NEGLIGENCE—COUPON TICKETS—INJURIES ON ANOTHER LINE.—The Chicago Railway Review, for August 8, publishes the interesting case of Hartan v. Eastern R. R. Company, Supreme Judicial Court of Massachusetts, November, 1873, which holds that, where two railway companies, by mutual contract operate their road as one continuous line, but each manages and operates its own part thereof, and one of them sells a coupon ticket which will take the passenger over the entire line, and on that portion of the line owned and operated by the other company, the passenger is injured, the company selling the ticket is not liable. At the conclusion of the opinion of the court, WELLS, J., says: "The case differs from that of Hill Manufacturing Company v. Boston and Lowell Railroad Company, 104 Mass. 122, in the evidence both of the contract between the parties and of the joint relations between the connecting roads. And, besides, a carrier of persons stands in somewhat different relations to the subject of the service from the carrier of goods." We have examined this last case with considerable care, and are unable to perceive any substantial difference between the contracts between the connecting roads in the two cases. Nor do we perceive any reason why a different rule should be applied to carriers of passengers in such cases, from that applied to carriers of goods. Will a court of justice gravely lay down a rule of law for the preservation of inanimate merchandise in the hands of common carriers, which it will deny for the preservation of human life? See, also, upon the question of the liability of carriers of goods in such cases, Darling v. Boston, etc., R. R. Co., 11 Allen, 295; Burroughs v. Norwich & W. R. R. Co., 100 Mass. 26; Nutting v. Connecticut River R. R. Co., 1 Gray, 502; Judson v. Western R. R. Co., 4 Allen, 520; Perkins v. Saco & Portsmouth R. R. Co., 47 Maine, 573; Bruntnall v. Saratoga & Whitehall R. R. Co., 32 Vermont, 665; McMillan v. Michigan, Southern and Northern Indiana R. R. Co., 16 Mich. 119; Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271.

LAW SCHOOLS—ADMISSION TO THE BAR.—The Albany Law Journal, for August 15, reprints Dr. Hammond's letter in this journal of August 6, with the following remarks:

> Mr. Hammond's memory is at fault as to the exemption of law schools in this state from the provisions of the act requiring a term of study being a temporary one. He is also in error in supposing that the discussions to which he alludes mean hostility to the law schools. A well conducted law school is unquestionably a great aid to the student of the law; but it is folly to suppose tha such a school can fit a young man, with no previous study or experience, for the bar, in the space of a year. We believe it to be a positive injury to students, as well as to the profession, for a school to attempt to do anything of the kind. It enables young men to gain admission to the bar before they are fitted for its duties, and by so doing, in many cases helps them to an untimely professional death. But little stress can be put upon the fact that the graduates of the law department of the University of Iowa are examined by a committee appointed by the court. This method is, perhaps, preferable to that of graduation of course, but examinations as usually conducted are but poor tests. The best prerequisite to admission to the bar is a sufficient *term* of study.

It will be seen that this embodies substantially the views that we have already several times expressed. The opposition is not to law schools, but to too rapid graduation. Or, if it is found impracticable for law schools to lengthen their course of study, then the protest is against admitting their graduates to the bar on the faith of their diplomas, without further examination.

We do not wish to be understood as attempting to lecture the law schools on this subject while passing over in silence the conduct of the courts. We have good reason to believe that the conduct of many of the courts in the West and South with regard to admitting candidates to the bar, has been remiss in the last degree. We are glad to be able to testify that the federal courts at Saint Louis, and the circuit

court of Saint Louis county, are conspicuous exceptions to this rule. But the painful fact is forced upon us that, as a general thing, the examination by judges, or by committees of the bar, of candidates for admittance to the bar, is a mere sham. We know of instances where a basket of champagne, or even a bottle of whiskey, has secured a favorable report, and where candidates have been admitted who had never read law a week, and who were even ignorant of the names of the leading elementary writers on the law. This state of things, which we believe is not new, but has existed in many quarters for years, is a scandal and a reproach to the legal profession. It inevitiably enforces upon men of sense, the conclusion that a profession which thus admits Tom, Dick and Harry to its honors, has very ilttle honor, and is unworthy either of the confidence or respect of the public.

Some of the Dying Glories of the Common Law.

The district of Columbia is governed by the common law, with very little statutory adulteration. The Washington Law Reporter, for August 11, in an able editorial, exhibits one of the beauties of that "perfection of human reason." One Thomas E. Walker, inflicted a mortal wound upon Michael J. Hillis, in the District of Columbia, but Hillis died at his home at Rosslyn, a place formerly within the jurisdiction of the District of Columbia, but which had been ceded back by Congress to the state of Virginia. The editor of the Law Reporter shows that, had the prisoner been convicted, the judgment must necessarily have been arrested; because, "while there may be some doubt us to whether an indictment for murder would lie, in the states in which the common law prevails, where the offence was partially consummated in different counties, although within the state, there can be no question that, where it was partially comsummated in different sovereign jurisdictions, an indictment would not lie in either." And, in support of this proposition, he cites the following authorities: Chit. Crim. Law, 117-18; 1 East P. C. 361; Bac. Ab. tit. Indictment; Com. v. Linton, 2 Va. Cases, 205; Stoughton v. State, 13 Smedes & M. 255; State v. Carter, 3 Dutch. 499; Orrell's Case, 1 Dev. 139; Riley v. State, 9 Humph, 646. The editor of the Law Reporter adds: "In England, and in most of the states, the failure of justice in this class of cases is prevented by statutory enactment; but the common law, as laid down in the above decisions, is the law of this district to-day." The jury, however, in the case of Walker, resolved the difficulty by acquitting the prisoner.

Another case which strongly illustrates the departing glories of the common law, was that of Pollard v. Lyon, lately determined in the Supreme Court of the District of Columbia. The action was for slander, and the words imputed were, "I saw her [the plaintiff] in bed with Captain Denty." The jury gave the plaintiff a verdict of $10,000. Now, since fornication is not an *indictable* offence in the District of Columbia, the court were obliged, in obedience to a firmly-settled rule of the common law, to arrest the judgment. It is but just to the court that we should quote their opinion. It was delivered by Mr. Justice HUMPHREYS. He said:

The motion in arrest of judgment is heard in general term now in the first instance. The words spoken by the defendant and charged in the declaration are "I saw her (the plaintiff) in bed with Captain Denty." It has been settled that at common law, words which if true, would subject the accused to infamous punishment, or to an indictment for a crime involving moral turpitude, are in themselves actionable without averment or proof of special damage. The rule must have been so settled on the ground that as between men, a charge made by one against another could result in no serious injury, as a general rule, unless the charge if true would subject the party of whom the words were spoken to the inconvenience and danger of an indictment in which the public would be arrayed against him. It may be true that a man suffers no real damage from words which, if true, would not and could not be followed by an indictment and punishment. Be the reason what it may, we find the rule and cannot depart from it.

Rude as the generation that established the rule may be thought to have been, it probably did not occur to them that the same rule would come to be applied in a more refined age so as to protect the defamer of a woman's character from responding in damages for the looseness of his tongue. Or it may not have entered the mind that the time would come when men could wantonly assail the reputation of woman's chastity. But we are bound by the stubborn rule of authority, and the remedy is by legislative action.

The words in this case import nothing else, legally or according to the common acceptation of those words, than a modest way of charging illicit intercourse between a man and a woman. The more delicate and covert the charge, the keener the injury. When the defendant said "I looked over the transom light and saw Mrs. Pollard in bed with Captain Denty," who would doubt his meaning?

If the charge was true, defendant could have justified; if untrue, he should be held to answer for the wrong committed. It is to be regretted that the rule in Ohio and Iowa is not the rule of the common law in governing us.

But we are bound by the rule that the charge must be in words which, if true, would subject the accused to an indictment. There is moral turpitude in the charge made; but the plaintiff could not be indicted even if the truth of the charge was established. The act of Maryland of 1749, removed the infliction of corporal punishment for fornication. and the act of 1786 repealed all proceedings for the punishment of fornication. We think that we are forced, however reluctant to do so, by the mandate of authority, to arrest the judgment.

Instances of this kind must convince the just and reflecting mind, notwithstanding all the encomiums which have been lavished upon the common law, what a rude and barbaric system, in many of its features, it really is. And perhaps its inconsistency and incongruity are nowhere more strikingly illustrated than in this very instance. It justly punishes the ravisher of female virtue with death; but against him who falsely imputes to her in public a want of chastity—who falsely accuses her of having *voluntarily* surrendered that which is dearer than life itself, it awards no punishment and affords no redress. Such maxims seem well adapted to the condition of such a people as the Sandwich Islanders, who are destitute of any due appreciation of female honor, but it is a reproach to the legislative body, wherever they are perpetuated among an enlightened and honorable people. Instances like these tend to convince us that the common law, instead of deserving the encomium of being the "perfection of human reason," deserves rather to be considered such a system of rude justice, combining many just and unjust maxims, as a nation of free islanders, surrounded, and, to some extent, isolated from other nations by a watery wall, have been able to frame for themselves; whose very isolation has led them to despise the systems of other people and to refuse to profit from the study of them, while it has nursed their minds into a bigoted admiration of their own errors and follies.

—FOR the information of a correspondent and others who may not know, we would state that the Vanderbilt University, the law school of which is advertised on our outside page, is located at Nashville Tennessee. This institution has been munificently endowed by Commodore Vanderbilt of New York, to the extent, we understand, of three quarters of a million dollars. Its law school opens with a strong faculty, and gives promise of at once having position as the first law school of the south. Among the text-books adopted we notice Bigelow on Estoppel, and Dillon on Municipal Corporations. It is a compliment to these authors.

Indian Reservation—Railroad Land Grant—Construction of Land Grant Act to Kansas in Aid of Railways, and of Treaties of the United States with the Osage Indians.

THE UNITED STATES v. THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY.

United States Circuit Court, District of Kansas, June Term, 1874.

Before MILLER and DILLON, JJ.

1. **Land Patents—Suits by Government to Set Aside.**—Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in the circuit court, to annul and set aside the patents.

2. **Osage Lands—Cancellation of Patents at Suit of Government.**—On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stats. at Large, 240), and the subsequent treaty with the same Indians, proclaimed January 21, 1867 (14 lb. 687), and of the act of Congress of March 3, 1863 (12 lb. 772), granting lands to the state of Kansas to aid in the building of railroads: *Held*, that land which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy, did not pass under the said railroad grant, and that the United States were entitled to have cancelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant.

This is a bill in equity in the circuit court, filed by the direction of the attorney-general, to set aside patents issued by the executive officers of the United States to the defendant company. The ground of the bill is that the patents were issued without authority of law and are void. The substantial question in the cause is whether the defendant company is entitled to the land patented to it. The claim of the defendant to the land is under the land grant act ofMarch 3, 1863 (12 Stats. at Large, 772), which is in the usual form, and under the treaty of 1865, proclaimed January 21, 1867 (14 Stats. at Large, 687), which it is contended ratified or conferred the right. These acts and treaties, so far as material, are referred to in the opinion of the court.

The lands in controversy are within a tract 30 by 50 miles in extent, containing about 960,000 acres, and embraced in the counties of Neosho and Labette, and part of the counties of Bourbon, Crawford, Allen, Wilson, and Montgomery, in the state of Kansas, and were part of the reservation occupied by the Osage Indians, who have been in possession of it since 1808, until after the treaty of January 21, 1867, when they removed to their new home in the Indian Territory.

By treaty of June 2, 1825 (7 Stats. at Large, 240), the Osage Indians, by article 1, relinquished to the United States their title to a large quantity of lands. The second article of that treaty then provides that, "within the limits of the country above ceded and relinquished, there shall be reserved *to* and *for* the Great and Little Osage Tribe or Nation, aforesaid, so long as they may choose to occupy the same, the following described tract of land." [Here describing the reservation.]

The above tract of country thus reserved to the Osages, facing on the east fifty miles and running back to the western boundary of the tract described in the first article of the above treaty, continued to be the Osage Indian Reservation, and was used and occupied by them as such, and used by the government as provided in the second article of said treaty, until they relinquished their right thereto in 1867. The land in dispute is part and parcel of the reservation described in the second article of the treaty of 1825, and was used and occupied by the Osage Indians and the government until the treaty of 1865 was proclaimed, which took place the 21st of Jan. 1867. This last named treaty is dated the 29th of September, A. D. 1865, and was ratified on the 26th of June, 1866, with the addition of *certain amendments* thereto advised by the senate, and which amendments were accepted by the Indians on the 26th day of September, 1866, and the said treaty was proclaimed by the President on the 21st of January, 1867. There is an express provision in the seventeenth article of the treaty that it shall not go into operation until proclaimed by the President. 14 Stats. at Large, 687.

The nature of this treaty, and the senate amendment relied on by the defendant, sufficiently appears in the opinion of the court.

On the 10th day of April, 1869, Congress passed an act authorizing *bona fide* letters upon any of the lands ceded to the United States by the treaty proclaimed January 21, 1867, to purchase the same in limited quantities, within two years, at $1.25 per acre, whether odd or even numbered sections, saving, however, the legal rights of others. 16 Stats. at Large, 55.

Under this joint resolution a large number of settlers went on the land, made the required improvements, proved up their settlements before the local office, paid their money and received their certificates of entry. Three hundred and fourteen thousand, two hundred and twenty-eight acres of this land was entered under this joint resolution, and the settlers thereon, in addition to the fees and expenses of entering the same, paid the government therefor the sum of $454,072 10. Nearly all the rest of these lands have been settled upon; some under the joint resolution, by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms for cash, would be carried out by the Government, and that consequently they would be able to purchase their lands for cash when the government executed the trust.

There are between 30,000 and 40,000 of these settlers upon the land in controversy, who are indirectly interested in the result of the present suits.

The entries of the land under the joint resolution have been ordered to be set aside and canceled by the secretary of the interior, on the sole grounds that these railroads had a prior grant of these lands. They have nearly all been canceled, and are being canceled as they are reached in the regular course of business in the land department. The interior department at different times has been divided in opinion whether the railroad grants included the land in question.

Geo. R. Peck, U. S. district attorney, and *Wilson Shannon*, and *McComas & McKeighan*, for the United States; *S. O. Thatcher*, *T. C. Sears*, and *N. T. Stephens*, for the defendant.

Mr. Justice MILLER.—This case, with that of the same plaintiffs against the Missouri, Kansas and Texas Railroad Company, is submitted to the court on the bills, answers, replications, documentary evidence, and agreed statements of facts. The facts are undisputed, and without complication. The questions to be considered are exclusively questions of law.

The bill is filed by the United States, under the direction of the attorney-general, to set aside and annul certain patents for lands, issued to the defendant by the secretary of the interior; on the ground that they were issued without authority of law. The case of the United States v. Stone, 2 Wallace, 525, is conclusive, so far as any authority is necessary, of the right to the relief sought, if this statement be true.

The defendant, a corporation which has built a road through the lands in controversy, and received of the United States the patents which are assailed in the bill, asserts the validity of these patents under an act of Congress of March 3, 1863, and the treaty with the Osage tribe of Indians, proclaimed Jan. 21, 1867.

In addition to the very able oral arguments on both sides at the bar, and the printed arguments of counsel engaged in the present case, there have been filed copies of printed arguments before the secretary of the interior, which show that his action in issuing the patents was not hasty, or wanting in reflection, but was the result of deliberate judgment after hearing counsel. This circumstance is not without embarrassment in the minds of the court now called on to consider the same question. But the constitutional adviser of the government, the attorney-general of the United States, has felt it to be his duty to ask for a cancellation of these patents, and, as the only question raised is upon the proper construction of the act of Congress and the treaty aforementioned, it is eminently a judicial one, which the

court cannot avoid, or decline to decide; how high soever may be its respect for the decision of the department of the interior.

The act of Congress referred to, fouud in 12 Statutes at Large, p. 772, by its first section, grants to the state of Kansas, for the purpose of aiding in the construction of certain railroads and branches, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, and each of its branches.

The road, so far as the matter now in issue is concerned, is described in the act as one from the city of Leavenworth, by way of the town of Lawrence and the Ohio City crossing of the Osage river, to the southern line of the state, in the direction of Galveston Bay, in Texas. This description would carry the road through a large body of land, then in the peaceful possession and occupancy of the tribe of Osage Indians, lying within the border of the state of Kansas. By a treaty between the United States and this tribe, made September 29, 1865, before the line of said railroad was located, the tribe ceded to the Uuited States a large body of lands, embracing those in controversy.

The first question, therefore, which presents itself for solution, is whether the grant of lands, as made by Congress in 1863, includes the lands then held by the Osage Indians, by the ordinary tenure by which Indian tribes hold lands in the United States, but afterwards ceded by treaty to the government. I say, by the ordinary tenure by which Indians hold lands, because I do not find anything in the language of the treaty of 1825 with that tribe which changes the nature of their title.

Counsel for defendants have supposed that in considering the effect of the grant under the act of 1863 upon these lands, a material consideration, favorable to their claims, is that the grant is to be construed with reference to the condition of the title of these lands when the line of the road was located and adopted by the company. This argument is based upon what must be conceded to be true, that the particular Congressional subdivisions of alternate sections of odd numbers which are to constitute the specific lands granted by the act, must be determined and can only be determined by the location of the line of the road, by an actual survey, showing its relation to those sections. The counsel have, therefore, argued with much force that the act of Congress is not a grant *in præsenti*, but a grant *in futuro*, and that as the particular sections granted must await the location of the road to determine where they would fall; therefore, that *time*, and that *location*, must govern or be looked to as governing all other considerations bearing upon the extent or limits of the grant.

This proposition, however, is obviously unsound, in view of the general course of the road established by the grant. It must be a road from Leavenworth to the southern boundary of the state, in the direction of Galveston Bay, in which Lawrence and the Ohio City crossing are points and the lands upon which it must operate; or, in other words, the *general* location and character of the lands which may be taken under the grant, are either definitely laid down in the act, or are to be inferred from considerations existing at the time the act was passed. And this is true, whether in technical language we call it a grant *in presenti* or a grant *in futuro*. In point of fact it has some of the characteristics of both classes of grants.

As these lands, though then in possession of the tribe, are in the line of the proposed road, and between Leavenworth and the southern boundary of the state, they are lands within the general descriptive terms of the grant, unless they are excepted out of them by other parts of the act, or by other paramount considerations.

I am of opinion that on both these grounds the act can not be held to include these lands.

1. When the act was passed the lands were, and had been for a very long time, in the peaceful and undisputed possession of the Osages. And though the treaty of 1825 between them and the United States did not so far vary their tenure as to give them a fee simple title, or, indeed, anything but a usufructuary right, it did guaranty to them the exclusive possession and use of these lands "so long as they may choose to occupy the same." This treaty was in full force when the act under which defendant claims was passed, and it is not believed that a tthat time any proposition to relinquish this possession had been made by the tribe, or any effort by the United States to induce them to do so. To hold, then, as argued by the defendants, that whenever they might choose to locate the line of their road through the Indian Territory, the title to the land, with all that full title implies, passed to them by virtue of this act, so far as odd sections for ten sections in width on each side would go, is to hold that Congress had violated this treaty provision, had disregarded the generally conceded rights of Indians in such lands, and had authorized a gross injustice to a feeble and ignorant ward of the government. For if the lands were subject to the grant at all, it must be admitted that no provision whatever is made in the act for the protection of Indian rights, nor even for delay in enforcing the title thus passed to defendants.

When I consider, that in the many grants of this character made by Congress, they have never, unless in this case, intended to include lands which, by treaty, or any other contract, or indeed any other equitable consideration, they should not grant, I can hardly believe that they intended, by the use of general terms necessary to a description of the route of the road, to grant away the lands which by all these considerations they were bound to retain within their own control.

In saying this, I do not consider the question of the power of Congress over lands thus situated. I consider only the question of intent, of the actual will of the legislative body, which they designed to put into the form of a statute. It is this, as in all cases of construction, which must govern; and if it were a question now for the first time presented to my consideration, on these general words of description alone, in the grant, I do not see how I could hold that Congress intended to include these Indian lands.

But the case does not rest on these general words of description alone. This was by no means the first act of Congress donating lands to aid in construction of railroads. Millions of acres had been previously granted for the same purpose, and so many statutes of that kind had been passed, that the language in which the grants were made had become reduced to settled formulæ, and one of these formulæ designed to protect rights previously acquired, as found in every other statute of a similar character, is found in this. It is in the shape of a *proviso* to the granting section, in the following words:

"That any and all lands heretofore *reserved to the United States* by any act of Congress, or *in any other manner, by competent authority*, for the purpose of aiding in any object of internal improvement, or *for any other purpose whatsoever*, be, and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States."

It will be thus seen that from the operation of this act, as of all others of like character, and by the settled policy of the government, there is excepted any and all lands which, by act of Congress, or in any other manner, by competent authority, for any purpose whatsoever, is reserved to the United States.

I cannot adopt the criticism of distinguished counsel, that the exception here provided for is limited to lands set apart and reserved for some special use which the government of the United States may have for them. These acts are all dealing with lands which *belong* to the United States—lands over which its ownership and dominion are absolute. There is no occasion, therefore, to make of such lands a reservation for the benefit of the United States. But there were many cases in which, while retaining the title, the government, by some of its branches, had set apart, had reserved for special uses of others, and for other uses than those of the government, lands

of the United States. Such is the construction placed upon this clause in the cases of Wolcott v. the Des Moines Navigation Company, 5 Wallace, 681, and fully reconsidered and adopted in the more recent case of Williams v. Baker, 17 Wallace, 144. Can it be said, with any show of reason, that the lands under consideration in those cases, which were withdrawn from sale by reason of the disputed claims of the state of Iowa, were reserved to the use of the United States?

If, however, this criticism has any just foundation in its application to the general clause of exception found in this and in all other land grants, it cannot affect the present grant; for in proceedings for the probable failure of the grantee, from various causes, to obtain all the odd sections on each side of the road within the prescribed limits, by giving other land in place of them, among the causes of such failure are mentioned previous sales, or grants, homestead rights, "*or that the same has been reserved by the United States for any purpose whatsoever.*" Now if the solemn covenant in a treaty made by the United States with a tribe of Indians, that these lands "shall be reserved to and for the Great and Little Osage tribes or nations aforesaid, so long as they may choose to occupy the same," is not a reservation by the United States for another purpose than building railroads, it is difficult to comprehend the use of language or what kind of reservation that clause was meant to cover.

I am, therefore, of opinion that, by the necessary outlook at the condition of this land when the grant was made, and the gross violation of justice and solemn treaty rights in the Osages which a grant so construed necessarily implies, Congress did not intend to include these lands in the grant. And, 2. That in each of the two clauses reserving ands from the operation of the act, they have by apt words expressed theintention that these lands should not be included in the grant.

The treaty with the Osage Indians, of which we have been speaking, contains a clanse which is relied on by defendants as sufficient to remove any doubt which may arise from the foregoing views, and I now come to consider that branch of the subject. By the first section of that treaty as originally negotiated and signed on the 29th day of September, 1865, the Osages sold to the United States that part of their lands which includes the land now in controversy, with others. And in consideration of this grant and sale to the United States, the government agreed to pay the sum of $300,000, to be placed to the credit of the tribe, in the treasury of the United States, and that interest thereon at the rate of five per cent. per annum should be paid to the tribes. The lands were to be surveyed and sold for cash as public lands, are surveyed and sold under existing laws. After reimbursing the United States, the cost of survey and sale and the sum of $300,000 above mentioned, the remaining proceeds of sale were to be placed in the treasury to the credit of the civilization fund, to be used under the direction of the secretary of the interior, for the education and civilization of Indian tribes residing within the limits of the United States.

When the treaty was under consideration in the senate, that body made numerous verbal amendments, and among others not merely verbal, they inserted after the word "laws" the words, "including any act granting lands to the state of Kansas in aid of the construction of railroads through said lands." To this amendment, made June 26, 1866, the Indians consented. So that this part of the treaty, as finally proclaimed January 21, 1867, reads as follows:

"Said lands shall be surveyed and sold under the direction of the secretary of the interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws *including any act granting lands to the state of Kansas in aid of the construction of a railroad through said lands*, but no pre-emption claim or homestead settlement shall be recognized." 14 Statutes at Large, 687.

The phrase thus inserted and here italicised, is supposed by the defendant's counsel to have reference to the lands now in controversy, and to have the effect of subjecting them to the railroad grant. The difficulty of determining what is their precise meaning in the connection in which they are employed, is very great. As regards their influence on the decision of the question before us, they may be, or rather must be, considered in one of these lights. 1. As granting by treaty, and by force of their own meaning, lands to aid in the construction of this railroad which had not been so granted before. 2. As placing, by means of a treaty with these Indians, a construction upon the doubtful language of the act of Congress which we have already considered. 3. As a recognition, by competent authority, of the existence of such a grant, which must necessarily be the act aforesaid.

1. The first of these propositions is wholly inadmissible. Conceding the doubtful proposition that it was within the power of the president and senate and this tribe of Indians, without the assent of the house of representatives, to have appropriated these lands to such a purpose, they have expressed no such intention. Whatever the language may or may not mean, it is clear that it was not intended to go beyond existing laws. It did not design to make any new law, or confer any new right.

2. Nor is it easy to believe that the senate of the United States would undertake, in a treaty with Indian tribes, to construe an act of Congress. If they did, they certainly could intend to go no further than to express their own understanding of the meaning of statute, without designing to give to that expression the authority of a legislative construction. Neither the senate alone, nor in conjunction with the president, is authorized to construe acts of Congress so as to bind the legislative and judicial departments of the government.

In saying this it is not intended to deny that any contract in such a treaty, by which rights are conferred on either party to the treaty, based upon a construction of an existing act of Congress, may be valid, and the contract be construed as it was understood by the parties. But in this case, neither the state of Kansas nor the defendant corporation were parties in the treaty, nor was it the purpose of the treaty, as amended, to confer any new right on these or either of them.

Nor do the words inserted, or the language of the treaty as amended, imply any intention to construe the act of Congress granting lands to this road. The act is not recited or referred to, except inferentially. No doubt or question of its construction is raised or decided. If referred to at all, it is, hypothetically, as "any law granting lands to aid in constructing a railroad through said lands." Of course, if there was no such law, this treaty did not undertake to make one.

3. But the force of this phrase in the treaty must rest on the third proposition I have suggested, namely, that it is a recognition of the act we have been considering as a grant of these lands.

I have no hesitation in expressing my belief that the senator, whoever he may have been, that suggested that amendment, had in his mind the act which we have already construed, and that his purpose was to incorporate into the treaty a recognition of the *validity of the grant*, so that the treaty should not defeat it. There may have been in his mind, there probably was, a doubt of the right of Congress to make such a grant in the face of the treaty of 1825. The treaty now under consideration, originally presented to the Senate, provided for the sale of *all these* lands, and for the disposition of *all* the money arising from such sales, in a manner inconsistent with such a grant. With these two treaties staring him in the face, he must have felt the doubt whether the grant, even if by its terms it had included these lands, would be upheld as valid. To remove the argument which might be drawn from this treaty as originally made, it was easy to induce the senate and the Indians to recognize any right which may have been acquired by that act, or any other which was an existing law when the treaty was ratified by the senate. In consenting simply to this, the senate would feel that no wrong was done, because no new right was

conferred by or concealed *in* the amendment, At the same time, as the new words introduced designated no specified statute or law, the attention of the senate was not, probably, directed to this particular statute. But as no other law was then in existence, so far as is shown to us which, by remotest inference, granted lands to aid in constructing a road through these lands, I must believe that the framer of the amendment had this one in his mind.

The true intent and meaning of the clause in the mind of the senate, seems to have been this: that, as the treaty directed *all* these lands to be sold, and made provision for the disposition of *all* the proceeds, and, as it was suggested that there might be a railroad grant, or grants, which covered some of the lands thus directed to be sold, this provision was inserted to remove or prevent a conflict between the treaty and the statute, if any such existed.

But this provision, intended to prevent the treaty from defeating the statute if such existed, is now relied on to give the statute a construction which we have already said was forbidden by its own terms. Leaving out of the case the want of authority in the treaty-making power to construe statutes for the courts, and the improbability that the senate would attempt in this mode to give a construction to the act of Congress, it is clear that they did not *intend* to do this. They meant to say that *this treaty* shall not, by reason of its comprehensive terms in disposing of these lands, destroy existing rights. It recognizes existing laws, and, in the sale ot these lands and disposal of the proceeds, existing laws shall be respected, if any exist, appropriating any part of these lands. But it certainly did not intend to declare what rights existed, or to construe statutes on which rights might depend, or to create rights in that regard which did not exist independent of the treaty.

As I have already expressed my clear conviction, that the act of Congress did not grant any of these lands, but by express language excepted them out of the grant, I cannot give to this ambiguous phrase in the treaty, after conceding to it the meaning most favorable to defendants of which it is susceptible, the effect of creating a grant of these lands where none existed before.

These propositions, in my judgment, dispose of the case. They require that the patents issued by the United States for these lands be set aside, anulled and held for nought, and that the defendants be decreed to have no title in any of the lands in question, and perpetually enjoined from asserting such title.

DILLON, Circuit Judge:—I fully concur in the conclusion reached in the foregoing opinion, and in the reasons advanced to support it.

DECREE ACCORDINGLY.

Land Grant to Aid Railways—Indian Reservation —Treaty with Osage Indians Construed.

THE UNITED STATES OF AMERICA v. THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

Circuit Court of the United States, District of Kansas, June Term, 1874.

Before MILLER and DILLON, JJ.

For reasons similar to those in the case of The United States v. The Leavenworth, Lawrence and Galveston Railroad Company (*supra*), the lands reserved for the benefit of the Osage Indians did not pass, under the land grant of Congress, to the state, to and in the building of railways, approved July 26, 1866.

The facts in the case appear in the case of the same plaintiff against the Leavenworth, Lawrence and Galveston Railroad Company, *supra*.

George R. Peck, district attorney, *Wilson Shannon*, and *McComas & McKeighan*, for the United States; *T. C. Sears*, for the defendant.

Mr. Justice MILLER.—This case differs from that of the same plaintiff against the Leavenworth, Lawrence and Galveston Railroad Company, in this: that the act of Congress which is the foundation of defendant's claim to the lands in controversy, was passed July 26, 1866.

The significance of this difference in the dates of the grants is found in the assertion of defendants that the lands in question had then been ceded, by the treaty which we have discussed in that case, to the United States.

It is hence argued that, as the United States had then the title to these lands, unincumbered by the Indian right of occupancy, there is no reason to suppose they were not included tn the general granting clause, or that they were reserved within the meaning of the excepting clause.

It will be perceived, by looking at the date of the act of Congress, and the dates of the respective stages of the treaty, that the treaty had passed the senate, but with material amendments, June 26, 1866—one month before the approval of this bill by the president. But it had then to be submitted to the Indians for their action on these amendments. Their approval was given September 21, 1866, two months after the passage of the act of Congress, and the treaty only became valid and operative by the proclamation of the president of January 21, 1867.

There was, therefore, no valid subsisting treaty by which the Indian title to these lands was extinguished when the act of July 26, 1866, became a law.

But if the treaty had been fully ratified at the date of the passage of the act under which defendants claim, that treaty was, itself, as much a reservation of these lands, within the meaning of the excepting proviso, as the treaty of 1825 was in the case we have before considered. It directed a sale of *all* these lands. It disposed of *all* the proceeds of the sale, and, by a necessary miplication in appropriatng them to other purposes, they were reserved for those purposes.

The amendment to the treaty which we have considered, as it regards the other case, can have no application to the act of July 26, 1866, because by its express terms it is limited to existing laws. The amendment had been acted on, and passed from the control of the senate, a month before this bill became a law. It was not an existing law when the amendment was proposed and adopted, and the amendment, therefore, had no reference to it.

The argument that the bill and the treaty must both be considered as pending at the same time, and therefore construed with reference to each other, is not, in my judgment, entitled to much weight. If it had been the intention of the *senate*, in making the treaty, to have consented or contracted that the bill which was then pending, and which might, or might not, become a law granting lands to the state of Kansas, should include these lands, they would certainly have used language that looked to that purpose. Their language has reference only to grants already made to existing laws.

So, if *Congress* had intended to grant these lands, knowing that a treaty for their cession was then under consideration in the senate, which, by its provisions, appropriated the lands and proceeds of their sale to other purposes, they surely would have used some language to specifically include these lands, or at least to take them out of the excepting clause.

A decree similar to that in the other case must be entered.

DILLON, Circuit Judge.—I cc ncur.

DECREE ACCORDINGLY.

[Communicated.]

The Amended Bankrupt Act—Judge Hopkins Construction of the Amendments to the 35th and 39th Sections.

In the CENTRAL LAW JOURNAL, of the 13th, appears an opinion of Hon. J. C. HOPKINS, of the Western District of Wisconsin (Hamlin Assignee, v. Pettibone, p. 404), in which several points of great interest to the profession are discussed and decided. Four points are argued and decided, the decision of either one of which would have determined the motion presented. Two of the questions decided are interesting and important in the administration of

the law as amended. One of them, however, only applies to pending suits. But the other is of paramount importance, and the decision of it is no less than a discussion and determination of the effect of the amending act upon the 35th and 39th sections of the original act and a construction of the same as amended, and to this point I propose to direct attention briefly.

The amendments to these sections, which are the subject of discussion in this opinion, consist, substantially, in the making of the validity of the transfers of property, forbidden therein, to depend, under the amended sections, upon the question whether the person receiving such transfer has *knowledge* that the same is made in fraud of the provisions of the act, instead of making it depend, as under the original sections, upon whether such transferree *had reasonable cause to believe* that such fraud was intended. In other words, the amendment consists in the substitution of "*knowledge*" for "*reasonable cause to believe.*" The shortest statement of the result of the reasoning of the learned judge, is about this: *Knowledge* and *notice* are convertible terms. Notice is that which puts the party upon enquiry, and this latter is reasonable cause to believe. Hence, reasonable cause to believe is knowledge. If this be the correct construction, then, though there is a change of phraseology in these sections, their meaning remains the same, and the amendment is nugatory. But, notwithstanding the acknowledged ability and learning of Judge HOPKINS, which give his opinion upon these questions great weight, I shall endeavor to show, by reference to a very few simple rules of construction, that he has fallen into error in this case.

One of the elementary maxims of interpretation is, that statutes are to be read according to the natural and obvious import of their language; not so much regarding their propriety of grammar, as their general and popular sense. Sedgwick on Statutory and Constitutional Law, 260; 6 Exch. 328, 333; 20 Wend. 555; 1 Blackstone's Commentaries, 59; Smith's Const. Law, 661, Sec. 513. Taking this as a rule of interpretation, what is meant when it is said that a man *knows* a fact? The answer is, that he has that actual mental consciousness which with certainty assures him of its actual existence. It is the very highest degree of assurance of the existence of the fact. The word itself expresses the superlative degree of mental cognition, and is not, like *notice* and other similar words, subject to the classification of *actual* and *constructive*. This view is, I think, sustained by all lexicographers, as well as by the universal usage of the best speakers and writers in the language. We say we suspect a thing; we have information which tends to make us believe it, and if followed up would reveal it to us. We do believe it, still it may not be true. But when we say we *know* it, that is the end of controversy.

This being the popular and obvious meaning of the word used, it is not only within the maxim we have quoted, but within another well known rule: "It is not allowable to interpret what has no need of interpretation." Smith's Const. Law, 627. If I am right in my view of the meaning of the word used, it is very obvious that *knowledge* is by no means synonymous with *notice*. *Notice* has a technical signification, distinct and different from its popular meaning, which is usually called *constructive notice*, which signifies, not actual cognizance of the given fact, but of such facts as would, upon enquiry and the use of diligence, lead to a knowledge of the given fact. *Actual notice* of course signifies knowledge, but *constructive* notice never was used, in any well considered case, as the equivalent of knowledge, nor was the term knowledge ever accurately used to signify constructive notice.

We quote from the opinion. After citing numerous cases to the point, that notice is knowledge, and among others 20 Howard, 343, the opinion proceeds: "In some of these cases notice is used instead of knowledge, but as is said in Goodman v. Simond, 20 How. *supra*, it is usually in the same sense, and that is one of its appropriate significations." This purports to be language quoted from, or sanctioned by, the case of Goodman v. Simond. But it is very apparent that there is some mistake here. The opinion in that case was delivered by Mr. Justice CLIFFORD, who discusses the rights of a *bona fide* holder of commercial paper, after quoting with approbation, Swift v. Tyson, 16 Pet. 1, in which it is said "that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of facts which impeach its validity, may recover, although, as between the antecedent parties, the transaction may be without any legal validity," he proceeds: "The word notice, as used by the court on the occasion refered to, we think, must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. This case then proves simply, not that constructive notice nor reasonable cause to believe is knowlege, but on the contrary the very reverse, that *actual notice* is *knowledge*, but by a necessary sequence *constructive notice* is not.

All the authorities cited upon this point by Judge HOPKINS relate to the doctrine of *constructive notice*, and contain very elaborate and accurate dicussions of its application in courts of equity, to cases of fraud, but not one of them gives the least sanction to the doctrine announced in the opinion, viz: that constructive notice, or reasonable cause to believe, is knowledge.

Suppose, however, that it be conceded for the sake of the argument, that there is such a thing as *constructive knowledge* as well as *constructive notice*, then there is room for interpretation, and we must look to the usual mode of ascertaining the legislative intent. Treating *knowledge*, then, as a technical term susceptible of two interpretations or significations, and calling the one *actual* and the other *constructive*, as in the case of notice, what was meant by Congress in the given case, by the use of the term? Was it *actual* knowledge, or was it reasonable cause to believe; *i. e.*, knowledge of such facts as would put the party on enquiry—constructive notice merely? The intention of Congress must be obvious from several of the well known rules of interpretation founded in reason and common sense. The interpretation is mainly to be determined, as is said, "inside of the statute." But reference should be had to the whole act in the interpretation of any part or clause in which doubt arises, and such a construction should be given as to give effect to every part. Sedgwick, 237, 1 Binn, 601; 7 Cush. 53–89; 2 Mich. 138, Smith's Const. Law, 647, Sec. 502.

Again, where a statute is remedial or amendatory, reference should be had to the previous state of the law, or the statute amended; and the amendment, or the remedial act, should be so construed as to suppress the mischief and advance the remedy. 1 Blackstone's Com. 61; Sedgwick, 235. Applying these rules to the question under consideration, we see that the act amended (the act of 1867) provides a system of bankruptcy, stringent and highly penal in its provisions, both as to acts of bankruptcy by the debtor, and preferences to the creditor. This excessive stringency rendered the act odious in the estimation of many of both the debtor and creditor classes, so much so, that for two sessions of Congress, the repeal of the act and the entire abolition of the system were iminent; and as a matter of legislative history, proper to be considered, this would have occurred but for the amendatory act, which is in its whole scope *remedial*, altering, amending or repealing, almost, if not quite, all, the penal provisions of the original act; requiring a greater number of creditors to join in involuntary petitions; increasing the length of time commercial paper might remain unpaid without constituting an act of bankruptcy; providing for the discharge of the bankrupt upon greatly easier terms; shortening the length of time prior to the filing of the petition within which a preference should be held invalid; and, in the same sections, striking out "*reasonable cause to believe*," and inserting "*knowledge*"—substituting a term which is susceptible of an interpretation consonant with the general remedial purpose, making preferences less obnoxious to the law, and more easily sustained as valid, that is, more difficult to impeach.

In this view there can be little hesitancy in determining that Congress meant to use the term *knowledge* in its primary and popular sense, if ,indeed, it is susceptible of use in any other. It were about as rational to say that when Congress struck out "*four*" and inserted "*two*," and substituted "*three*" for "*six*," it still meant "*four*" and "*six*," as to say that when it struck out "*reasonable cause to believe*," and inserted "*knowing*" and "*knew*," it still intended the courts to read it "*reasonable cause to believe.*" A remedial act should be so construed as to meet the beneficial end in view, and to prevent a failure of the remedy; and, as a general rule, a remedial statute ought to be construed liberally. Smith's Const. Law. 692, Sec. 547. I need hardly extend this discussion further, for very clearly, upon principle and authority, the learned judge has fallen into error. If the view be correct that Congress intended so to change the law as to require, in order to defeat a preference, that the person receiving it should have had actual knowledge of the fraudulent intent, the rule which Mr. Justice CLIFFORD laid down in Goodman v. Simond, *supra*, and the rule applied in the interpretation of the term "knowledge," in criminal cases, where its appropriate use is most frequent, will prevail. 1 Bouv. Law Dic. 692. A. I.

The New Pension Laws.

We give below the text of all the pension laws enacted by Congress during the session just ended, with full and complete instructions for obtaining the benefits thereof:

"AN ACT to increase the pensions of soldiers and sailors who have been totally disabled

"*Be it enacted, etc.*, That section four of the act entitled an act to revise, consolidate and amend the laws relating to pensions, and approved March third, eighteen hundred and seventy-three, be so amended that all persons who, while in the military and naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular presence, aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month; and this shall be in lieu of a pension of thirty-one dollars and twenty-five cents per month, granted to such person by said section: *Provided*, That

the increase of pension shall not be granted by reason of any of the injuries herein specified, unless the same have resulted in permanent, total helplessness, requiring the regular personal aid and attendance of another person.

"SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

"Approved June 18, 1874."

Under the provisions of the above act, only those pensioners who require the regular presence of an attendant are entitled to $50 per month. Those who have lost both legs, or a leg and an arm, are evidently not included. Proof of regular attendance will be required, and application must be made on form B. Blanks are furnished free to pensioners on application to the pension bureau. The increase dates from June 4, 1874.

"AN ACT to increase pensions in certain cases.

"*Be it enacted, etc.*, That all persons who are now entitled to pensions under existing laws, and who have lost either an arm at or above the elbow, or a leg at or above the knee, shall be rated in the second class, and shall receive twenty-four dollars per month: *Provided*, That no artificial limbs or commutation therefor, shall be furnished to such persons as shall be entitled to pensions under this act.

"SEC. 2. That this act shall take effect from and after the fourth day of June, eighteen hundred and seventy-four.

"Approved June 18, 1874."

The above law increases to $24 per month, from June 4, 1874, the pensions of those who have lost an arm at or above the elbow, or leg at or above the knee, without reference to the wearing of an artificial limb. In order to obtain the benefits of this act, pensioners have only to return their certificates, accompanied by a letter giving their post-office address, no formal application being required. No medical examination will be ordered, excepting in cases where the evidence on file fails to show the point of amputation. Pensioners receiving the increase will not be entitled to artificial limbs or commutation provided for by the act of June 17, 1874.

"AN ACT to equalize pensions in certain cases.

"*Be it enacted, etc.*, That all persons entitled to pensions under special acts fixing the rate of such pensions, and now receiving or entitled to receive a less pension than that allowed by the general pension laws under like circumstances, are, in lieu of their present rate of pension, hereby declared to be entitled to the benefits and subject to the limitations of the general pension laws entitled 'An act to revise, consolidate and amend the laws relating to pensions,' approved March third, eighteen hundred and seventy-three; and that this act go into effect from and after its passage; *Provided*, That this act shall not be construed to reduce any pensions granted by special act.

"Approved June 6, 1874."

Heretofore, pensioners who were on the roll by special act, the act fixing the rate of their pension, were debarred from increase under the general pension laws. The above act places this class of pensioners on the same footing as other pensioners, so far as rating is concerned, but does not grant arrears, the increase dating from June 6, 1874. The return of the pension certificate to the pension bureau, accompanied by a letter giving post-office address, is all that is necessary.—*U. S. Pension Record.*

Book Notices.

PATTISON'S MISSOURI DIGEST.—A Digest of the Missouri Reports. Volumes 1 to 49, inclusive, beginning with the year 1821, and ending with the year 1872. By EVERETT W. PATTISON, of the Saint Louis bar. 2 vols., pp. 783. Price $15 00. Saint Louis: W. J. Gilbert. 1873. For sale by Soule, Thomas & Wentworth.

One of the most judicious and satisfactory digests of the reports of a state that was ever published was Meigs' Tennessee Digest, published in 1848, and embracing the first twenty-six volumes of the Reports of that state. So complete a picture did it present of what was actually decided in each case, and also of the *ratio decidendi*, that it came to be of almost equal authority with the Reports themselves. It was constantly quoted in the courts of Tennessee, in lieu of the Reports, and was frequently so quoted by the judges of the supreme court of that state in their opinions. But Mr. Meigs could never be induced to make a supplement to it; and the reason why he could not, may, perhaps, be explained by a remark which he makes in his preface, where he declares that the task which he had endeavored to accomplish was "at once *profitless, slavish* and *inglorious*." No juster estimate of the nature of such labor could be conceived. He who expects either to make money or acquire reputation through the labor of digesting the Reports of a state, unless it be an old and very populous state like New York, is pursuing a vain and foolish undertaking. He will discover in such a task little else than the most slavish toil; and the manner in which it must be proceeded with necessarily drives him, during most of the time he is engaged in it, from one title to another; so that he is even deprived of the satisfaction which the mind takes in pursuing to the end the continuous investigation of a single topic. If he works by topics, he is sure to make many omissions. To avoid this, he is obliged to go through each volume of Reports, and digest each case as it comes, and as he proceeds, distribute his notes in the proper parcel or pigeon-hole. The work of finally arranging, re-reading and *squeezing together*, if we might use an expression which every digest-maker will understand, completes the principal part of his task.

For five years Mr. Pattison labored most assiduously with all the time he could spare from his professional duties, in the preparation of the work now before us. Although we understand that he gets the usual copyright paid to authors of books of this kind—perhaps something more, yet, from our knowledge of such matters, we do not believe that he has, as yet, received a thousand dollars as compensation for this exhaustive toil; nor do we believe that his remuneration will ever exceed a dollar a day for the time actually spent upon this work. And yet we are convinced, both from our own examination and use of it, and from the general professional estimate of its value, that is one of the best works of the kind that has been published. Nevertheless, we have heard attorneys, far advanced in their profession, complain of the price at which it is sold — men who would charge a client fifty dollars for doing an amount of work no greater than can be found on any one of its pages.

There is among bookmakers, critics, and the profession generally, considerable difference of view as to how a digest of reports should be made. Some think that it should consist of succinct statements, in the abstract, of points decided, and nothing more. Others would add to such a statement the reason or reasons which influenced the court in so deciding. Others strenuously urge that in digesting cases, the facts of the case ought to be briefly stated, and then the ruling or judgment of the court thereon, and nothing more. Others, again, prefer this mode of abstracting cases, but would add to it the *ratio decidendi*. We are of opinion that the latter would be, if practical, decidedly the preferable way. But, in order to make a digest in this mode, the author must have far more time than is usually allotted to such a task, the publisher must be content to face the probabilities of a heavy loss, and the profession must expect a work three times as large, and costing three times as much, as would be the case if the first method above indicated were pursued. We like very much the views of Mr. Bishop (First Book of the Law, ch. 14), upon the question how a digest should be made. After giving his view of the manner in which the *points* decided should be expressed, he says, § 211: "when a judge announces a principle of special importance with special clearness, the digest should state it in brief form, marking it as a *dictum;* thus, (D). The extent to which this sort of work should proceed must depend upon circumstances; such as the particular object of the digest, and the space which it is deemed justifiable to allot to it. A book, which the profession will not buy, is of no use; therefore, every author, on whatever topic, and whatever the style of his work, has properly some regard for its merchantable quality. It is often necessary to make a smaller book than the subject really demands, for the reason that one fully large enough would not be purchased and used.

When Mr. Pattison commenced his task he saw that it would necessarily include some forty-five or fifty volumes of reports. He therefore felt it necessary, in order to bring it within the proper limits, to adopt the *abstract* form made in fraud of the provisioning of the act, instead of making it depend, as under the original sections upon whether such transferree *had reasonable* of stating the points decided, pursued by Mr. Brightly. This plan he appears to have adhered to throughout, using in all cases as much brevity as was consistent with clearness. The result is that his work makes two small, imperial, octavo volumes, which, with the help of interleaving, are swelled to the size of volumes of 600 pages each.

We could easily demonstrate, if we had space, that most of the paragraphs of any digest could be arranged, not incorrectly, under any one of three or more titles. This being the case, it is obvious that the arrangement of the subject-matter of a digest must be, to a great extent, arbitrary; and that the *best arrangement* will always be attained, when each item is placed under that title and sub-title, where a majority of the profession will be most apt to look for it in the first instance. Mr. Pattison was aware of this; and, accordingly, whenever he was in doubt as to the best arrangement, he consulted largely with the members of the bar, and adopted the arrangement indicated by the views of the greatest number. The result is an arrangement of titles as logical and useful, perhaps, as any that could be devised.

We cannot close our observations upon this excellent work, without referring to what appears to be a feature of great value. Mr. Pattison has devoted seventy one pages of closely printed matter to a table of cases criticised, doubted, explained, affirmed, overruled, etc. This is in addition to the regular table of cases digested, and must have cost great labor and patience in its preparation. In some of the states indexes of cases, not as complete as this, are published and sold in separate volumes at a high price. To give some idea of the manner in which this part of the work has been done, we quote the following:

"Wear v. Bryant, 5 Mo. 147; see, also, 4 Mo. 113. Owners of injured land entitled to locate, affirmed: McCamant v. Patterson, 39 Mo. 100. As to who are legal representatives, cited: Hammond v. Public Schools, 8 Mo. 84. Commented on: Kirk v. Green. 10 Mo. 254; see Page v. Hill, 11 Mo. 150. As to relinquishment of claim cited: Joeckel v. Eastman, 11 Mo. 126. As to reversion of lands to United States, cited: Holme v. Stantman, 35 Mo. 306; see Moore v. Moore, 14 Mo. 425; Wright v. Rutgers, Ib. 587. Commented on and disapproved, so far as it holds that parties by subsequent assent to location could claim the benefit of New Madrid certificates, issued by the recorder: Holme v. Stantman, 35 Mo. 309, *et seq.* That the owner was the person intended to be benefited, approved: McCamant v. Patterson, 39 Mo. 107."

PLEADING AND PRACTICE, under the Codes of Ohio, New York, Kansas and Nebraska, applicable also to other states having a code, with forms. By SIMEON NASH. 4th edition, greatly enlarged, 2 vols. Cincinnati: Robert Clarke & Co.. 1874. Sold by Soule, Thomas & Wentworth.

This work of Judge Nash, a well known jurist of Ohio, and the author of Nash's Ohio Digest, has been expanded from one volume to two. It sets out the Code of Ohio, and, in immediate connection with each section, the construction it has received by the courts, giving, as the author states, the language of the courts. This edition is full of forms of all kinds of pleadings under the code, and is a useful work of the character.

Summary of our Exchanges.

The Pittsburg Legal Journal, for August 19th, contains nothing but selected matter which we have already published or noticed.

The Legal Intelligencer, for August 14, publishes Chambersburg Savings Fund Association v. McLellan, which discusses what is such negligence as will render an assignee liable for the loss accruing to the trust estate thereby.

The Irish Law Times, for August 1, continues its interesting leader on life insurance frauds, and otherwise prints a large amount of matter, but without interest on this side of the Atlantic.

The Pacific Law Reporter, for August 4, publishes, without a syllabus, Burton v. Hard, Supreme Court of the United States, which discusses several questions of evidence.

It also reprints from the Internal Revenue Record, the case of Boise County v. Gorman, same court, the syllabus of which is given above.

The rest of its space is filled up with notes of cases collected from various sources.

The Irish Law Times, for August 8, contains a leader (No. 1) on Life Insurance Law and Legislation, the subject of which is warranty on the part of the person for whose benefit the policy is taken. We intend to reprint it. It will be good reading for those judges whose decisions have supported life insurance companies in dishonestly wriggling out of their obligations, after pocketing large sums of money in premiums. The other matter contained in this number of the Irish Law Times and Irish Law Times Reports, is for the most part only of a local interest.

The Pacific Law Reporter, for August 11, reprints from the Washington Law Reporter, the case of Pollard v. Lyon, holding that since the act of Maryland, of 1749, removing the infliction of corporal punishment for fornication, and that of 1786 repealing all proceedings against that offence, words spoken of an unmarried woman, imputing to her that act, are not actionable in themselves.

It also publishes without syllabus, several decisions of the Supreme Court of California—among them Pickett v. Hastings—Beneficiaries of the Van Ness Ordinance classified—The phrases "may be recovered," "legal process," defined—Statute of Limitations considered. Also Rewick v. Goldstone Patent Right—Contract. Also People v. Hunckler—Criminal Law—Twice in Jeopardy. The decision in this case is unintelligible for want of facts. It also publishes Forster v. Pico, Mexican Grant.

The Chicago Railway Review, for August 22, contains, in its legal department, abstracts of a number of interesting discussions on railway law, mostly of the Supreme Judicial Court of Massachusetts.

Also McLellen v. Chambersburg Saving Fund Association, the syllabus of which is as follows: In auditing the third account of a trustee, the auditor examined and re-stated some items which had been contained in or omitted from the former accounts, and thereby established the fact that the former settlements were incorrect. *Held*, not to be erroneous.

Also the Warren Savings Bank v. Palmer, in which Mr. District Judge McCandless rules that under the amendment to the 39th section of the bankrupt law, the debtor will be required to file a list of his creditors, and the amount of their claims, where an involuntary petition was filed against him since December 1st, 1873, to which he had made a denial and a demand for a jury trial, and had since filed a demurrer.

The Albany Law Journal, for August 22, contains an article on Married Women as Attorneys, which is a gently facetious criticism on the opinion of Mr. Justice Nott of the court of claims, refusing to admit Mrs. Lockwood as a solicitor of that court. It also has an article on Supreme Court Reporting, which appears to be a controversy between the editors of the "Supreme Court Reports," New York, and Mr. Hun, the new "official reporter" of the same court. We sincerely hope that Messrs. Thompson and Cook may succeed in getting the "official" reporter by the heels; for their reports are as good as they can well be made, and as cheap as they can be published without loss, and there seems no good reason why, after the signal failure of one "official" reporter of that court, another should endeavor to occupy the same field, which is well occupied already. We have not seen Mr. Hun's first volume, but we have a strong feeling that he is endeavoring, under the prestige of "official" sanction, to crowd out his betters; and we say to him, that unless he expects to make a better "official" reporter than his predecessor, he had better "step down and out."

The Albany Law Journal contains a large amount of other reading matter—brief, various and well written, or judiciously selected.

The Nashville Commercial, Reporter for August 10, publishes Gheen v. Osborne, Supreme Court of Tennessee, of which the following is the syllabus:

1. If A., the owner of part of a lot, by his representations, or silence, induce B. to believe that C. is the owner of the whole lot, and under this belief B. purchased the whole lot, A. is estopped to set up title to any part of the lot, and upon the application of B., a court of equity will divest A. of the title to his part of the lot.

2. Where a bill is filed for the specific execution of a contract by a purchaser against his immediate vendor, and another alleged to be the owner of a part of the land purchased, and the title-bond is only signed by one of the parties, and the bill does not allege that the other party had sold to the other vendor, or had authorized the other vendor to sell the whole property, a specific execution will not be decreed.

In Wilson v. Effler, published in the same journal, the Supreme Court of Tennessee reversed and remanded the cause, directing a decree to be rendered against the defendant. After the case was remanded the defendant pleaded his discharge in bankruptcy granted to him pending the suit, and the court sustained the plea and held that no personal judgment could be rendered against him in the case.

The American Law Times reports, for August, contain Excelsior Insurance Co. v. Royal Insurance Co., Court of Appeals of New York, holding that, a mortgagee who has insured his mortgage-interest for his own indemnity, without any agreement with the mortgagor, may, in case of loss, call upon the insurer without first exhausting his remedy under his mortgage.

It also publishes *re* Deckert, noticed in this journal (*ante*, p. 320). Also Walsh v. Barton, from advanced sheets of 24 Ohio State Reports—the subject of which was a bill for the specific performance of contracts to convey land.

Also, Commissioners of Boise County v. Gorman, where the Supreme Court of the United States hold that a writ of error does not operate as a supersedeas until the filing of the bond, but that under the act of 1872 the bond may be filed and a supersedeas obtained any time within sixty days after judgment; and that such suspersedeas will have the effect of preventing further proceedings under an execution, but will not affect whatever may have been done prior to its being issued.

Also *re* Soloman, United States Circuit Court, Eastern District of Virginia, in which Chief Justice Waite holds that a statute which permits the head of a family to waive a homestead exemption, is not an infraction of a constitutional provision by which a homestead is created; and that where a part[illegible]o had, in a negotiable promissory note, waived his right of homestead exemption, and was subsequently adjudged a bankrupt, the homestead was not exempt as against the holder of the note.

Also Warren v. Ives, published in this journal for June 25 (*ante*, p. 312). Also several other interesting cases.

The Canada Law Journal for August (Milling & Williamson, Toronto), contains the judgments of the Election Court in the North Victoria, Cardwell and North Simcoe cases. Extra copies can be had at $1 each. It also contains some other interesting matter original and selected.

The Chicago Legal News, for August 22, publishes an able opinion of Mr. Justice Scott, of the Supreme Court of Illinois, in Buler v. Huestis, expounding a will executed by a married woman, under a power contained in a trust deed. The words in the will, "heirs of her body," are construed. The court

holds that, so far as estates tail are concerned, the rule in Shelly's case is repealed by the state statute. There are several important questions passed upon this opinion. It will repay a careful reading.

Also an opinion of the same court (by Walker, Ch. J.,) in Carpenter v. Davis. In this case a husband devised a tract of land to his wife, and died, leaving children. The wife married again and had children by the second husband. He promised his wife, if she would sell the land devised to her by her first husband, that he would purchase other land in her name to be held by her for the children of the first husband. She sold the land and the husband purchased the other land; but instead of taking the deed in her name, as he agreed, he took it in his own name. On a bill filed by the children of the first husband, after the death of the wife, *held* that by agreement between the husband and wife, the property became a trust fund, and the husband not having pleaded the statute of frauds, equity would declare and enforce the trust; that the husband had no courtesy in the land, as it was held as trust property under the agreement with his wife, and that he was properly chargeable with the rents.

The Legal News also commences in this number the publication of the opinion of the Circuit Court of Cook County, Illinois, by Williams, J., in what is known throughout the country as the Cheney case. The editor of the Legal News says of this case: "It has been in the courts, in one form or another, for the past five years. A full history of the case will be found in the statement that precedes the opinion. Few cases have been so warmly and ably prosecuted and defended as this one. The late Bishop Whitehouse, from a sense of religious and official duty, pressed the prosecution with all the power and energy he possessed. Mr. Judd, chancellor of the diocese, gave the case years of thought and study, and did all that talent, perseverance and experience could do to sustain what he considered the authority of the church. Mr. Fuller defended Dr. Cheney with an ability that would reflect honor upon the most distinguished member of the bar. He seemed always to be equal to the emergency, and when defeated in the controversy, managed so skillfully as to prevent the defeat from working disasterously to the interests of his client. He deserves great credit for the skill and wisdom displayed in this protracted ecclesiastical controversy. Judge Williams has spent much time and labor in the preparation of his opinion."

[Want of space compels us to hold over several of our exchanges, received this week, for notice next week.]

Notes and Queries.

We are glad to have received the following. It seems that the bungle in the Missouri Statute suggested by F. W. (*ante* p. 422) has been resolved by an act of the last legislature. We hope other subscribers will help each other's difficulties in our column of notes and queries:—

SHELBYVILLE, MO., August 22, 1874.

EDITORS CENTRAL LAW JOURNAL:—In answer to query in your journal, bearing date of August 20th inst., signed "F. W.," you may reply that if plaintiff's witness lives out of the county where the trial is had, whether one mile from the place of trial or forty, his deposition can be taken and used at the trial. See page 45, "Session Acts" of 1873.

Very respectfully yours,

CHAS. M. KING.

HINTON, W. VA., Aug. 12, 1874.

EDITORS CENTRAL LAW JOURNAL:—By virtue of a homestead law, which exempts $1,000 in real estate from sale, can A., who wishes to avail himself of the benefit of such exemption, set apart *two houses*, one in which he and family resides, and the other a business house which he rents to other parties, though both together are only worth $1,000? There has been no decision on the subject, either in Virginia or West Virginia, as the homestead laws in both states are of recent date. Please answer through the JOURNAL, and oblige A YOUNG LAWYER.

ANSWER.—If our correspondent had been more careful in stating his question, we should be able to give him a more satisfactory answer. First, he should have set out the statute of West Virginia, which gives the homestead exemption. Secondly, he should have informed us whether the dwelling-house and store-house are on *the same lot*. We advise our correspondent to consult the following cases, where he will find his question repeatedly answered yes and no, under a variety of statues, and with various reasons given for the answer:—Hubbell v. Canady, 58 Ill. 425; Reinbach v. Walter, 27 Ill. 393; Re Tertelling, 2 Dillon C. C. 339; Rhodes v. McCormick, 4 Iowa, 368; Ragland v. Rogers, 34 Tex. 617, 621; Hancock v. Morgan, 17 Tex. 582; Pryor v. Stone, 19 Tex. 371; Moore v. Whitis, 30 Tex. 440; Gregg v. Bostwick, 33 Cal. 220 (leading case); Ackley v. Chamberlain, 16 Cal. 181; Clark v. Shannon, 1 Nev. 568; Goldman v. Clark, Ib. 607; Hoitt v. Webb, 36 N. H. 158; Buxton v. Dearborn, 46 N. H. 43; True v. Morrill, 28 Vt. 672; Kelly v. Baker, 10 Minn. 156; Kresin v. Mau. 15 Minn. 116.

Legal News and Notes.

—IT is said that ex-Postmaster General Creswell has been retained on behalf of the government, under the Geneva award act, and will represent the interests of the United States in all cases to be considered.

—AT a public meeting recently held at Leeds, it was resolved to petition parliament for the release of Orton the unsuccessful Tichborne claimant, and for a new trial. Mr. Guilford Onslow was one of the speakers.

—THE New York Herald is responsible for the assertion that Judge Mackey of South Carolina, wears a silken gown, and goes to and from court preceded by the sheriff, carrying a drawn sword. The sheriff, we presume, is a colored person, which would make the thing look picturesque.

—THE Chichele professorship of international law at Oxford University, made vacant by the resignation of the Right Hon. Montague Bernard, one of the Washington commissioners, has been conferred on Mr. Thomas Erskine Holland, of Lincoln's Inn, barrister at law, and of All Soul's College, Oxford.

—THE attorney-general of Arkansas has decided that it is the duty of the state treasurer to obey the convention ordinance appropriating the sinking and school fund to pay the expenses of the state government. The treasurer refuses to obey the ordinance until compelled to do so by a mandamus from the court, and a suit is now pending to that effect.

—THE attorney-general has decided that the revised statutes do not change the law as to the toll upon the tonnage of vessels engaged in foreign commerce, and that now, as formerly, the said tax is only collectable upon the entry of such vessels, and not before their clearance, and is oniy collectable once in each year.

—WE regret to learn that the new constitution for Ohio, recently submitted to the vote of the people of that state, and which embodied so many excellent and needful reforms, has been defeated. The causes of the defeat are said to have been the submitting of four different propositions to a separate vote, which led many of the enemies of these respective propositions to combine for the defeat of the instrument.

—THE commissioner of the general land office has directed that the regulations respecting final proof of homestead settlement in the grasshopper region of Iowa and Minnesota, be so modified as to permit settlers to go before the clerk of their county court to make their depositions, instead of before the local land officers. This order is made on the representation of trustworthy parties that many settlers remote from a local land office, can illy afford the expenses of a long journey, especially in their present impoverished condition.

—WE learn that "the life of Chief Justice Chase," written by Mr. J. W. Shuckers, Mr. Chase's private secretary for ten years, is shortly to appear from the Appleton press. Among the specially interesting portions of the work is a chapter relating to the secret history of the reversion of the legal tender decision, and another giving for the first time various details in the Jefferson Davis case. It will also contain the eulogy of Chief Justice Chase, pronounced by Hon. William M. Evarts, before the Dartmouth Alumni at their last commencement.

—A MASS meeting was held on Saturday night, at Parsons, Kansas, the occasion of which was the promulgation of the news of the decision in the Osage land cases, which we elsewhere print. A press dispatch states that there was great rejoicing. At least five thousand people were assembled to celebrate their deliverance from the railroad companies, and the little city of Parsons was wild with enthusiasm. Speeches were made by Hon. M. W. Reynolds, Mayor Mathewson, Colonel Davis, T. C. Cory and others, and at a late hour the people adjourned, feeling, for the first time, that they could go to their own homes.

—JUDGE BLATCHFORD has decided that the United States district attorney is still entitled to two per cent., and the clerk of the United States District Court to one per cent. on all moneys recovered in custom-house seizure suits in his district. He holds that the law of 1874 abolishing moieties and informers' fees does not cover the allowance of these per centages which are given in lieu of costs and fees that the district attorney and clerk would otherwise be entitled to in the suits mentioned, but which are not allowed by any provisions of law.

—COL. S. S. FISHER, ex-commissioner of patents, and author of Fisher's Patent Cases, was, together with his son, drowned, while passing in a small boat through Conewago rapids, fourteen miles below Harrisburg. He was educated in Philadelphia, and practiced law in Cincinnati before his appointment. In 1871 he resigned, and again entered into the practice of law in that city with great success. By his knowledge of patent law, when commissioner, he did much to improve the administration of business in that office, the patent law of 1870 being mostly of his suggestion. He was also the first to introduce competitive examinations. His son, who was also drowned, was a

bright boy of twelve years of age. Colonel Fisher was about 43 years of age. He leaves a wife and two children.

—IF Comptroller Green of New York City, keeps on, he will accquire the reputation of being a "litigious person." The following are only a portion of the fees paid by him for professional services, during the past month:

Henry L. Clinton, retainer	$1,500
E. L. Paris, professional services	1,336
Lyman Tremain, professional services	12,500
J. C. Carter, professional services	4,000
Martin & Smith, professional services	3,500
James M. Smith, professional services	1,800
William Barnes, retainer	3,100

—THE Irish Law Times publishes the proceedings of the benchers of Gray's Inn, expelling Dr. Kenealy, from which we extract the following: "The following resolutions were moved by Master Manisty, seconded by Master Holker, and carried unanimously: '1st. That the pension find as a fact that Dr. Kenealy is the editor of the newspaper called the Englishman. 2d. That the Englishman is replete with libels of the grossest character. 3d. That Dr. Kenealy, being editor of that newspaper, is unfit to be a master of the bench of this honorable society.' The following resolutions were moved by Master Manisty, seconded by Master Hoiker, and carried by a majority of 10 to 1: '4th. That the call of Dr. Kenealy to this bench be and the same is hereby vacated. 5th. That Dr. Kenealy be prohibited from dining in the hall of this society until further order.'" When these proceedings were had, Dr. Kenealy was at home sick. We are sorry that the learned advocate should thus be deprived of his dinner, without an opportunity to be heard.

DISBARRED—WHAT A STARVING LAWYER WILL DO FOR BREAD.—Mr. Weightman, who, it will be remembered, was convicted at the Central Criminal Court, and sentenced to six month's hard labor for purloining books from Inner Temple Library some time ago, has, since his liberation from confinement, been called upon by his benchers to answer for his conduct, and has been disbarred after an investigation lasting over three days. During the enquiry it transpired that, on being released from prison, a check, representing public subscriptions, amounting to £600, was handed over to him. After the sentence of disbarment had been passed upon him he gave notice of appeal to the judges, but failed to put in an appearance at the appointed day; and notwithstanding every enquiry, no one has since heard of him. It was rumored that of the proceeds derived from the sale of one book which he had taken, he actually applied a portion to the sustenance of a brother barrister (since dead), who, like himself, was, at the time of the commission of the offence, starving and almost dying. Since the disclosure of the privations endured by Mr. Weightman, a fund has been established by all the inns of court to alleviate the wants of the poorer members of the bar.—*Irish Law Times.*

Notes of Cases.

[These notes of cases are either prepared or selected with care by one of the editors.]

Life Insurance Policy not avoided by Failure of Company to Comply with Law regarding Corporations.—A life policy issued by a foreign company, is not rendered void by the neglect of the company to comply with the provisions of the act of April 16, 1867, providing for the incorporation and regulation of insurance companies; nor will such neglect in an action brought against the company on the policy, excuse the policy-holder from paying premiums according to the terms of the policy. Union Mutual Life Ins. Co. v. McMillen, 24 Ohio State, 67.

———. **Failure to Pay Premiums.**—Where a life policy is made and accepted, upon the expressed condition that the annual premium is not fully paid within the time specified, the policy "shall be null and void, and wholly forfeited," the failure to pay the premium avoids the policy. Ibid.

———. ———. **Waiver of Forfeiture by Agent.**—Where the policy also provides that no agent of the company, except the president and secretary, can waive such forfeiture, authority conferred upon an agent before the premiums became due to collect them, does not impliedly invest him with authority to waive the forfeiture. Ibid

———. ———. ———. **Burden of Proof.**—Notwithstanding the limitation upon the power of agents, declared in the policy in respect to waiving the forfeiture, the company is competent to invest such authority in any of its agents. The authority may be express, or it may be implied from circumstances, but the burden of showing it, in either case, is on the party claiming the benefit of its exercise. Ibid.

———. ———. ———. **Ratification.**— An agent, having no authority to waive the forfeiture, acting in the interest of the assured, received the unpaid part of a premium on a forfeited policy, after the life insured had ended, for which he gave a receipt antedated, and forwarded the money to the company, concealing the facts as to such payment. *Held*, that the receiving of the money by the company, in ignorance of such facts, was no ratification of the act of the agent in receiving the money. Ibid.

———. ———. ———. **Failure to Return Premium Notes.**—The fact that the company, on tendering back the money so received, omitted to return certain notes given in part payment of premiums, but which the forfeiture of the policy rendered uncollectable, will not affect the rights of the parties in suit on the policy; nor is the fact that the notes are payable to order material, where they show on their face the consideration for which they were given. Ibid.

Bankruptcy—Injunction—Practice—Jurisdiction.—In *re* Fendly, a bankrupt in the federal district court at Tyler, Texas, Mr. District Judge DUVAL, ruled the following points:

1. That a bill for an injunction to restrain the alleged fraudulent vendee of a bankrupt from selling the stock of goods, need not be verified by the oath of the creditor himself, but that it will be sufficient if verified by his agent or attorney.

2. That since the district court is clothed with equity jurisdiction in bankruptcy proceedings, it has jurisdiction to entertain such a bill.

3. That such an injunction is not dissolved by operation of law when the debtor is adjudicated a bankrupt. Upon this last point the learned judge says: "It is true that under section 40 of the bankrupt act there is some reason to suppose it was intended that injunctions should cease to operate when adjudication was had. This, however, is by no means certain. But if such be the correct construction, I confidently believe that it only refers to such injunctions as were granted *simultaneously* with the order to show cause, and it is not applicable to such as might be granted *between the time of the commencement* of proceedings, *and up to the date of adjudication*, or even up to the appointmen t of an assignee. Between those intervals of time, matters may occur, or facts become known, which would render the use of the writ absolutely indispensible to the rights of creditors. And, in my judgment, the section referred to does not preclude the bankrupt court from granting such writs, under summary proceedings had for that purpose, at any time subsequent to the commencement of proceedings and prior to the appointment of an assignee. And I further believe that injunctions thus granted continue until vacated by order of the court.

The Power of a National Bank to Lend Money on Mortgages, or real estate securities, was denied in Fowler v. Scully, 72 Penn. St. 456. Fowler gave to a national bank, not being indebted to it, a mortgage to secure future advances. It was held that, under currency act of June 3, 1864, the mortgage was void. The provisions of the act were very fully examined by AGNEW, J., and the conclusion reached that national banks could loan money on no other security than personal.—[*Albany Law Journal.*

The same point was recently decided in the same way by the Saint Louis Circuit Court, Hon. CHESTER H. KRUM, presiding. Judge KRUM delivered an opinion upon the question which, we believe, was published in the Saint Louis Republican.

Liability of Attorneys and Collecting Agencies for Collections Made by their Agents.—In Bradstreet v. Everson, 72, Penn. St. 124, the court considered, at considerable length, the liability of attorneys and collection agencies for collections made by their agents. In that case Bradstreet had a "commercial agency" at Pittsburgh, to which Mr. Everson delivered acceptances payable in Memphis and took a receipt for them "for collection." Bradstreet sent them to an agent in Memphis who collected the money and kept it. The court held that Bradstreet was liable. After citing and commenting upon Cox v. Livingstone, 2 W. & S. 103; Kraus v. Dorrance, 10 Barr. 462, and Rhines v. Evans, 16 P. F. Smith 192, the court continued: "These cases show the understanding of the bench and bar of this state upon a receipt of claims for collection. It imports an undertaking by the attorney himself to collect, and not merely that he receives it for transmission to another for collection, for whose negligence he is not responsible. He is therefore liable, by the very terms of his receipt, for the negligence of the distant attorney, who is his agent, and he cannot shift responsibility from himself upon his client." This doctrine is sustained by the following decisions in other states: Lewis v. Peck, 10 Ala. 142; Pollard v. Rowland, 2 Blackf. (Ind.) 22; Cummins v. McLean, 2 Pike (Ark.) 402; Wilkinson v. Griswold, 12 Smedes & Mar. (Miss.) 669.—[*Albany Law Journal.*

Temperance Legislation—"Civil Damage" Laws.—The "Civil Damage Law" of Illinois, which is substantially identical with that of this state and of Ohio, has several times, recently, come before the Supreme Court of that state for construction. The Chicago Legal News of August 1, contains a late decision of the court in the case of Freese v. Tripp, which illustrates some of the abuses to which the act may be made subservient, as well as the proper rule of construction. The action was brought by the wife of an habitual drunkard against a saloon keeper, to recover damages for his having sold liquor to her husband. Evidence was offered and rejected that the wife was also a drunkard. It was also proved that the wife was in the saloon when liquor was

man would take the property. That it was Mr. Howell, and that he would sold to her husband, and could have prevented the act had she been so disposed. The court on this point said: "The whole thing seems very much like a concerted plan to entrap the defendant, and was successful. Many like cases will probably occur in enforcing this act. There is nothing easier than for a husband and wife of low morals, as these parties were, to combine and make a case, calculating on the prejudice of jurors for success." The court below, however, charged the jury that they might "consider the anguish or pain of mind, feelings the plaintiff suffered," and the jury might give her "exemplary damages;" if the act of sale was not "willful," and "if it was willful or wanton the jury should annex more damages;" instructions hardly appropriate under the circumstances of the case, even if they had been legal. The court said: "We hold a fair construction of this statute requires a party suing under its provisions should prove to the satisfaction of the jury actual damages sustained. Without this, exemplary damages cannot be awarded. This is the construction placed upon the act by the highest court of the State of Ohio, and it is reasonable to suppose the legislature adopted the law with the construction put upon it as generally held." Schnieder v. Hosiers, 21 Ohio St. 98 (S. C., 8 A. L. J. 135). And that "the anguish or pain of mind, feelings suffered by such intoxication of her husband," is not a matter for the consideration of the jury; the statute contemplates injury in person or property, or means of support, and not mental anguish." A minority of the court were not prepared to say that, where the actual damage is shown, mental suffering might not be considered upon the question of exemplary damages.—[*Albany Law Journal.*

Homicide—Negligent Driving—Onus of Proof.—In this case, the prisonor having been convicted at the Commission Court, Green street, of the homicide of an aged woman, by drivjng a horse and cab over her while she was crossing the street, a question was reserved as to whether the mere act of driving, being of itself lawful, lay it upon the crown to prove that the accused was guilty of negligence in the act that caused death, or upon the prisoner to show that he had not been negligent. J. Murphy, Q. C. (with him W. O'Brien, Q. C.), for the Crown; J. A. Curran, *contra.* MONAHAN, C. J., FITZGERALD B., MORRIS and LAWSON, JJ., and DOWSE, B. (O'BRIEN, J. *diss.*) *held* that the onus lay upon the accused to disprove the *prima facie* case against him of having caused the woman's death, and affirmed the conviction. (R. v. Cavendish; C. C. R., Jan. 29, 1874.—[*Irish Law Times.*

Municipal Bonds—Jurisdiction to Enforce Payment—Equity.—There can be no jurisdiction in equity to enforee the payment of corporation bonds until the remedy at law has been exhausted. Heine v. Levee Commissioners, Supreme Court United States, October Term, 1873.

———. ———. **Mandamus.**—Where the law has provided that a tax shall be levied to pay such bonds, a mandamus after judgment, to compel the levy of the tax, in the nature of an execution, or process to enforce the judgment, is the only remedy. Ibid.

———. ———. ———. The fact that the remedy has been shown to be unavailing, does not confer upon a court of equity the power to levy and collect taxes to pay the debt. Ibid.

———. ———. ———. The power to levy and collect taxes is a legislative function in this country, and does not belong to a court of equity, and can only be enforced by a court of law, through the officers authorized by the legislature to levy the tax, if a writ of mandamus is appropriate to that purpose. Ibid.

———. ———. **Liens.**—Taxes are not liens unless declared so by the legislature, under whose authority they are assessed. Still less can a lien be created by the mere duty to assess taxes, which has not been performed. Ibid.

Right of Real Estate Broker to Commissions—Unconditional Sale—Question for Jury.—In Clendenon v. Pancoast, Surpreme Court of Pennsylvania, 31 Legal Intelligencer, 253, the plaintiff brought suit to recover commissions claimed to have been earned by the plaintiff as a real estate broker. When his evidence closed, the court orded a nonsuit. The plaintiff averred that he was authorized to procure, and did procure, a person to bargain and buy of and from the defendant the land in question, for the price or sum of $17,000. The question in dispute was whether the sale was unconditional; for, if so, the plaintiff was of course entitled to his commissions. The evidence showed that the plaintiff had some negotiation with a Mr. Howell in regard to purchasing it, and that they had fixed upon a time to go and examine the property. During an interview soon after between the parties, the plaintiff informed the defendant that he thought he had procured a purchaser, but had given him the whole of that week to decide. To this defendant replied, "if your man will take it by Saturday, all right, he can have it; after this week I will not be bouud." The plaintiff communicated this to Howell. The latter examined the property, and on Saturday morning informed the plaintiff he would take it. He, however, requested the plaintiff to ask the defendant whether it would be convenient to take some mortgages on account of the purchase-money. Thereupon the same morning the plaintiff told the defendant that his like to give him some mortgages in part payment of the purchase money. The defendant replied, "that lets me out, I won't sell." The plaintiff said "no, he only said he would like to give you the mortgages if it suited you, but he will take the property anyhow, and will pay you cash if you require it." The defendant persisted in his refusal to close the sale, and Howell insisted upon the purchase, declaring his readiness to pay the cash as soon as the papers could be prepared. On the above facts it was *held* that the question whether the sale was not unconditional should have been left to the jury, and it was error to direct a nonsuit.

Railway Negligence—Evidence to show Extent of Pecuniary Loss.—In Pennsylvania Railroad Co. v. Dale, Supreme Court of Pennsylvania, 31 Legal Intelligencer, 253, which was an action against a railroad company for physical injury, it was held proper to admit, upon the question of damages, evidence to show that at the time of the accident, one part of the business of the plaintiff was dealing in lands, buying and selling the same; that he had a quantity of land then on hand; and to show the value of the business at the time of the accident, and the profits arising therefrom. The court say: "It is true that merely speculative profits are not to be considered, and against the consideration of such profits, the court carefully guards the jury by saying, "if, however, the business was uncertain and speculative, and not attended with any reasonable certainty of profits, then it would not have a pecuniary value to be estimated in this action. The damages in cases like these are to be arrived at by considering the reduction which the accident has wrought upon one's earning powers, whether mental or physical, or both combined, and in order to do this properly, reference must always be had to the business in which such an one is engaged at the time of the accident. No better rule can be laid down than that adopted by Justice SHARSWOOD, in the case of The iRailroad Co. v. Butler, in which he says: 'The proper measure of damages s the pecuniary loss suffered by the parties entitled to the sum to be recovered; and that loss is what the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, abilty and disposition to labor, and his habits of living and expenditures.' This rule, though immediately applicable to cases brought for damages resulting from the loss of the life of a husband or parent, is nevertheless applicable, *mutatis mutandis*, not only to the case in hand but to all similar cases.

"Human business is as varied as human wants and human ideas. Each one adopts that which suits him best, or from which he can derive the largest profits, and when, by another's negligence, he is deprived of the power of properly conducting such business, the question of what damages he shall have by way of compensation is wholly for the jury."

Fire Insurance—Reinsurance, when a Fraudulent Preference.—Cassery v. Manners. New York Supreme Court, Special Term (Daily Register, July 6), presents the following state of facts: The New Amsterdam Insurance Company of New York, having sustained great losses in the Chicago fire of 1871, resolved to reinsure its remaining risks in the Home Insurance Company of New Jersey, a new corporation with a paid up capital of $100,000, and which had done but little business, and to effect such reinsurance paid the Home Insurance Company, $40,000. The president and secretary of the New Amsterdam Insurance Company, were also president and secretary of the Home Insurance Company, and some of the directors of the former, were also directors of the latter company. The amount of the risks thus reinsured amounted to about $10,000,000. Immediately after effecting this reinsurance the officers of the New Amsterdam Company commenced negotiations with the policy-holders at Chicago for a settlement of their losses as adjusted at fifty cents on a dollar, and procured a composition deed to be signed by most of the policy-holders to that effect. The said losses, if paid in full, would have exhausted the entire capital and surplus of said company, and the remaining policy-holders would have been entirely without security. The Home Insurance Company continued to do business only for a few months, and was then wound up. It paid promptly all losses which accrued upon the risks transferred from the New Amsterdam. On the 19th day of December, 1871, the plaintiff was appointed receiver of the New Amsterdam Company, it being declared to be insolvent, and this action is brought against the directors of said company to recover of them the $40,000 paid to the Home Insurance Company, it being claimed to have been paid in violation of law.

Upon these facts the court (VAN BRUNT, J.) hold that the reinsurance of its remaining risks after the Chicago losses, amounted to a withdrawal from its assets of a fund, namely, the $40,000 paid as premiums, in which all the policy-holders were entitled to share; that since this fund was not withdrawn to effect a reinsurance for the benefit of all its policy-holders, but for the benefit of a portion of them only, it is such a fraudulent preference of policy-holders as is forbiden by the New York statute; and the plaintiff is entitled to recover.